AUDREY KAREN BARRY A

v.

DATUK DR YEE MOH CHAI

FEDERAL COURT, PUTRAJAYA B
ALAUDDIN MOHD SHERIFF PCA
ARIFIN ZAKARIA CJ (MALAYA)
NIK HASHIM FCJ
[CIVIL APPEAL NO: 01(f)-20-2008(S)]
17 APRIL 2009 C

ELECTION: *Petition - Application for declaration that election null and void - Allegation of corrupt practice - Evidence, detailed analysis of - Credibility of witness - Findings of fact - Prima facie case - Whether petition rightly dismissed - Election Offences Act 1954, ss. 11(1)(c), 32(a), (b), (c)* D

EVIDENCE: *Witness - Credibility of - Findings of fact by trial judge based on credibility of witnesses - Whether findings fully supported by evidence* E

EVIDENCE: *Burden of proof - Election offences - Prima facie case - Whether established by petitioner*

The appellant, a registered voter in the State Constituency, N15, Api-Api in the State of Sabah, sought to declare the election of the F respondent void pursuant to s. 32(a) and/or (b) or (c) of the Election Offences Act 1954 ('Act'). The appellant's petition was grounded on the allegation that the respondent and/or his agent with his knowledge and consent had during the campaign period printed, published and caused to be distributed pamphlets G intimidating, soliciting and persuading voters to refrain from voting for the opposition party's representative, which was an act of corrupt practice under s. 11(1)(c) of the Act. The appellant's case was largely based on the evidence of one Alexander Wong Min Vui ('PW2'). According to PW2, he worked for one "Ah Seng", whom H he claimed was the respondent's agent. The judge, on the evidence before him, found that the appellant had failed to prove that the pamphlets were distributed or deemed to be distributed by the respondent's agent. He stated that the appellant had failed to establish the identity of "Ah Seng", who was the link between the I respondent and PW2. The judge dismissed the petition accordingly. Hence, the present appeal in which the contentious issues were: (i)

whether the judge had misdirected himself in failing to appreciate that the evidence led to the inevitable conclusion that it was the respondent's agent who distributed the pamphlets; and (ii) whether the evidential burden of proof shifted to the respondent after the appellant had established the existence of "Ah Seng".

Held (dismissing the appeal with costs)
Per Arifin Zakaria CJ (Malaya) delivering the judgment of the court:

(1) The judge had found that there were serious contradictions and inconsistencies in PW2's evidence which undermined his credibility. As often been said when the findings of the trial judge are of pure facts based on the credibility of witnesses, the appellate court will not, as a general rule, interfere with such findings. The trial judge is in a better position to assess the credibility of witnesses after having seen and heard them. In the instant case, there was no requirement to engage in a detailed analysis of the evidence as this was meticulously done by the judge, whose findings were fully supported by the evidence before him. (para 23)

(2) It is settled law that it is for the petitioner to establish a *prima facie* case before the respondent is required to answer. In short, it was for the appellant to prove who this so-called "Ah Seng" was and that he was the agent of the respondent. The appellant, however, failed to do so and on that premise the judge had rightly dismissed the petition. *Ali Amberan v. Tunku Abdullah* (foll); *Wong Sing Nang v. Tiong Thai King* (foll). (paras 24 & 25)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, seorang pengundi berdaftar dalam Konstituen Negeri, N15, Api-Api dalam Negeri Sabah, cuba menuntut pengisytiharan bahawa pemilihan responden batal mengikut s. 32(a) dan/atau (b) atau (c) Akta Kesalahan Pilihanraya 1954 ('Akta'). Petisyen perayu berasaskan pengataan bahawa responden dan/atau agennya dengan pengetahuan dan kerelaannya telah semasa jangka masa kempen mencetak, menerbit dan mengedarkan risalah-risalah yang menakutkan, memancing dan memujuk pengundi-pengundi dari tidak mengundi untuk wakil pihak bertentangan, yang merupakan sesuatu perbuatan rasuah di bawah s. 11(1)(c) Akta. Kes perayu berdasarkan utamanya atas keterangan seorang yang bernama Alexander Wong Min Vui ('PW2'). Mengikut PW2, beliau bekerja

untuk seorang yang bernama "Ah Seng", yang beliau mendakwa merupakan agen responden. Hakim, atas keterangan yang berada di hadapannya, mendapati bahawa perayu telah gagal membuktikan bahawa risalah-risalah tersebut telah diedarkan atau dianggap diedarkan oleh agen responden. Beliau menyatakan bahawa perayu telah gagal membuktikan identiti "Ah Seng", yang merupakan penghubung di antara responden dan PW2. Hakim oleh itu menolak petisyen tersebut. Oleh yang demikian, rayuan semasa dibuat dalam mana isu-isu berikut perlu diselesaikan: (i) sama ada hakim telah menyalaharahkan dirinya apabila gagal menimbangkan bahawa keterangan membawa kepada kesimpulan yang tidak dapat dielakkan bahawa ia adalah agen responden yang telah mengedarkan risalah-risalah tersebut; dan (ii) sama ada beban membukti keterangan telah beralih kepada responden setelah perayu berjaya membuktikan kewujudan "Ah Seng".

Diputuskan (menolak rayuan dengan kos)
Oleh Arifin Zakaria HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Hakim telah mendapati bahawa terdapat penyangkalan-penyangkalan dan percanggahan-percanggahan serius dalam keterangan PW2 yang telah menjejaskan kredibilitinya. Seperti yang selalu dikatakan apabila dapatan-dapatan hakim perbicaraan ialah fakta-fakta tulen berdasarkan kredibiliti saksi-saksi, mahkamah rayuan tidak, pada umumnya, akan mengusik dapatan-dapatan sebegitu. Hakim perbicaraan adalah dalam kedudukan yang lebih bagus untuk menimbangkan kredibiliti saksi-saksi selepas melihat dan mendengar mereka. Dalam kes semasa, tidak ada keperluan untuk membuat analisis terperinci atas keterangan kerana ini telah dibuat dengan amat teliti oleh hakim, di mana dapatan-dapatannya disokong penuh oleh keterangan di hadapannya.

(2) Ia adalah undang-undang mantap bahawa pempetisyen perlu membuktikan kes *prima facie* sebelum responden perlu menjawab. Ringkasnya, perayu perlu membuktikan siapa sebenarnya "Ah Seng" kononnya dan bahawa beliau merupakan agen responden. Perayu, walau bagaimanapun, gagal berbuat demikian dan atas premis itu hakim telah menolak petisyen tersebut dengan betul. *Ali Amberan v. Tunku Abdullah* (diikuti); *Wong Sing Nang v. Tiong Thai King* (diikuti).

Case(s) referred to:

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2006] 3 CLJ 1 FC ***(refd)***

Ali Amberan v. Tunku Abdullah [1969] 1 LNS 6 HC ***(foll)***

Chong Sooi Chuen v. Yuen Lai Chun [1988] 1 LNS 28 SC ***(refd)***

Hii Soo Chiong v. Board of Management Yee Ting Primary School [1973] 2 MLJ 204 ***(refd)***

Wong Sing Nang v. Tiong Thai King [1996] 1 LNS 66 HC ***(foll)***

Legislation referred to:

Election Offences Act 1954, ss. 11(1)(c), 32(a), (b), (c)

Evidence Act 1950, s. 103

For the appellant - Datuk Chan Chin Tang (Hj Ansari Abdullah & Erueana Ansari with him); M/s Ansari & Co

For the respondent - Raymond Szetu Mei Thong (Baldev Singh with him); M/s Baldev Gan & Assoc

Reported by Suresh Nathan

JUDGMENT

Arifin Zakaria CJ (Malaya):

Background

[1] On 13 March 2009 by a unanimous decision we dismissed this appeal and we now give our reasons.

[2] The appellant in this appeal is a registered voter in the State Constituency, N15, Api-Api in the State of Sabah.The candidates for the said constituency in the general election held on 8 March 2008, were Ms Liew Chin Jin (also known as Ms Christina) and Datuk Dr Yee Moh Chai ("the respondent"). At the election, Ms Liew Chin Jin polled 3,245 votes against the respondent who polled 3,419 votes. The respondent was declared the winner of the election by a narrow margin of 174 votes.

[3] The appellant in his petition sought to declare the election of the first respondent as void pursuant to s. 32(a) and/or (b) or (c) of the Election Offences Act 1954 ("the Act"). In the alternative the appellant sought the declaration that Ms Liew Chin Jin as being duly returned or elected.

[4] The petition was grounded on the allegation that the respondent and/or his agent with his knowledge and consent had during the campaign period, printed, published and caused to be distributed in the State Constituency, N15, Api-Api and the Parliamentary Constituency P172, Kota Kinabalu, pamphlets in Chinese Language with reference to the election for the purpose of intimidating, soliciting and persuading voters in the State and Parliamentary Constituencies to refrain from voting Ms Liew Chin Jin. The pamphlets do not carry the name and address of their printer and publisher. One of the pamphlets was tendered and marked as exh. P1. It carries the picture of Ms Liew Chin Jin and Dato' Seri Anwar Ibrahim. Exhibit P1(T), the official certified translation of the pamphlet reads as follows:

i) Terrible! Prevented funding to Chinese Schools while in power,

ii) While in power he (Datuk Seri Anwar Ibrahim) appointed non-Chinese speaking administrator to Chinese Primary Schools;

iii) Misled children into public demonstration …

iv) Do you want foreign culture here?

v) Even members of the public were not spared …

vi) Arson is what they are good at.

vii) PKR's culture of street demonstration = riot + panic + unrest.

Do you want this?

[5] It is not in dispute that exh. P1 does not bear the name and the address of its publisher and printer. Under s. 11(1)(c) of the Act it is a corrupt practice for any person to print, publish, distribute or post up or causes to be printed, published, distributed or posted up any advertisement, handbill, placard or poster which refers to any election and which does not bear upon its face the name and address of its printer and publisher. If found guilty of such an act the person is liable to imprisonment for a term not exceeding one year and to a fine not exceeding two thousand ringgit. Therefore, the act of corrupt practice under s. 11(1)(c) is an offence under the Act. Further s. 32(c) of the Act provides that the election of a candidate at any election shall be declared void on an election petition on the ground that a corrupt practice or illegal

practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate. Hence an allegation of corrupt practice if proved carries with it not only the penal consequence but could also lead to the avoidance of the election.

Contentions Of Parties

[6] The learned counsel for the appellant submitted that the learned Election Judge had misdirected himself as he had failed to appreciate the overwhelming circumstantial evidence which leads to the inevitable conclusion, that it was the agents of the respondent who were responsible for distributing exh. P1.

[7] He also contended that the respondent in an election case and especially so on matters within his special knowledge, is under a duty to assist the court to adduce evidence to enable the court to have the full facts of the case. In other words the evidential burden of proof shifted to the respondent after the petitioner/appellant had established the existence of "Ah Seng".

[8] He submitted that during the trial, the respondent did not challenge the fact of the existence of "Ah Seng" and that the latter was working for the respondent during the election.

[9] Relying on P20 (written election expenses) he contended it clearly shows that "Ah Seng" was the worker of the respondent and Alex (PW2) was dealing with the latter. He said that on the circumstantial evidence, "Ah Seng" was, on the day in question at the Airport View Hotel, and the pamphlets came from there. It is submitted for the petitioner that the testimonies of the witnesses and the documentary evidence adduced had proven beyond reasonable doubt that the agents of the respondent were responsible for the distribution of the pamphlets.

[10] The learned counsel for the respondent in his rebuttal submitted that the burden of proof lies on both parties. He said the appellant cannot presume that the respondent has special knowledge of the existence of "Ah Seng". The burden is not on the respondent to show that "Ah Seng" was not his agent, he said the true identity of "Ah Seng" was not even proven on a balance of probability. He further said that on the totality of the evidence, the appellant failed to prove that the respondent's agent had distributed

the pamphlets. In this case the name "Ah Seng" did appear in P20 but without further evidence it is difficult to determine who this "Ah Seng" was.

Evidence Before The Court

[11] Let us now consider the relevant evidence before the court. The appellant's case is largely based on the evidence of Alexander Wong Min Vui (PW2). According to him, he worked for one "Ah Seng" whom he claimed was the agent of the respondent. As a matter of fact the only link between the pamphlets and the respondent is through "Ah Seng". If indeed it is proven that "Ah Seng" was the agent of the respondent then the respondent would be in breach of s. 11(1)(c) of the Act. In this regard it is therefore essential for the appellant to prove that "Ah Seng" was the agent of the respondent.

[12] In his testimony PW2 stated that the first time he saw exh. P1 was at the 5th Floor of the Airport View Hotel on 6 March 2008. He said a person whom he referred to as "Boss" asked him and others to distribute the pamphlets (exh. P1). He said "Boss" here refers to "Ah Seng".

[13] PW2 further testified that he went to Airport View Hotel twice and on each occasion he met RW6 (Chin Tek Ming). But prior to this meeting he did not know Chin Tek Ming; he was only informed about him by his friends. However on both occasions PW2 said he never spoke to Chin Tek Ming. But at the 5th floor Airport View Hotel he saw Chin Tek Ming directing the distribution of boxes which PW2 alleged contained the pamphlets, exh. P1. PW2 said he and the others were given a list of places to distribute the pamphlets. He was not sure why Chin Tek Ming had asked him to distribute the pamphlets but he said that day his job was to direct the people to go to work (distributing the pamphlets). He said he was part of the team leader in the distribution of the pamphlets and that under him there were almost 200 workers to distribute the pamphlets.

[14] PW2 also said that he met "Ah Seng" at Airport View Hotel at 5.30pm on 6 March 2008. At the hotel he saw Chin Tek Ming at the ground floor. He said he collected the pamphlets for distribution at 9.30pm. They left Airport View Hotel at about 9.30pm that night and his group went to Petronas Luyang to assemble. From there he directed the others to go to their

respective designated places to distribute the pamphlets. At about 10.30pm the same night, he said he received a phone call from his friend by the name of "Neal" that the latter was arrested at Foh Sang, Luyang. PW2 then rushed to the scene and at the scene he saw police personnel, PW1, Ms Christina Liew and Mr Foo, among others.

[15] PW2 said he told the police that he was directed by "Ah Seng" to distribute the pamphlets, exh. P1 and they were paid by "Ah Seng" to distribute the pamphlets throughout Kota Kinabalu.

[16] The learned counsel for the appellant in his submission contended that the evidence that "Ah Seng" was the agent of the respondent is supported by the election expenses statement (P20) which listed "Ah Seng" as one of the workers that were paid by the respondent.

[17] It is not in dispute that the name "Ah Seng" appears in exh. P20. The respondent (RW7) testified that he did not know when the workers were paid or when they worked. Since the name appears on the list he presumed "Ah Seng" was one of the party workers. But he maintained that he did not know "Ah Seng".

[18] The respondent also told the court that he did not prepare P20, though it relates to his election for the State Constituency N15, Api-Api. He said that it was prepared by his election agent Danny Tham, though he admitted that he signed P20.

[19] Then we have the evidence of Chin Tek Ming (RW6). He denied meeting PW2 at Airport View Hotel on the night of 6 March 2008 and he also denied that he had given him instruction to distribute the pamphlets. He testified that early that evening he was at Kopongit attending a Party meeting and arrived at Airport View Hotel after the meeting around 8.40pm. After dinner he said he stayed on at the hotel until around 12 midnight before going home.

[20] His evidence was supported by the evidence of Asriyani Summase (RW5) who arrived at the meeting around 6pm on 6 March 2008 and left at around 7pm. She testified that at the meeting at Kopongit she saw RW6 and two other party members.

[21] Based on the evidence before him the learned judge came to his finding that the appellant failed to prove that the pamphlets were distributed or deemed to have been distributed by the agents of the respondent. The learned judge stated in his judgment that the appellant failed to establish the identity of "Ah Seng" who was the link between the respondent and PW2. This is what he said:

> On the evidence in this case, I am of the view that it is impossible to establish the true identity of "Ah Seng" as described by PW2. Besides the evidence of PW2 as to the identity of "Ah Seng", there is no other evidence forthcoming from the other petitioner's witnesses as to the identity of "Ah Seng". At this juncture I may say that the burden is on the petitioner to establish with certainty who is this "Ah Seng" whom the petitioner claimed to be working for and known by the 1st respondent. It must be remembered that the petitioner had resisted the 1st respondent's application for further and better particulars earlier in this proceedings as to the person or persons claimed by the petitioner to be involved as agent or agents of the 1st respondent on the ground that any premature disclosure of their identities would compromise their personal safety and that this person or persons would be produced to testify and that their identities would be known at the trial. Unfortunately no evidence is forthcoming from the petitioner or any of the petitioner's witnesses on this matter.
>
> Learned counsel for the petitioner submitted that the burden is on the 1st respondent to show that "Ah Seng" was not his agent since it is within the 1st respondent personal knowledge. I think no such burden can be imposed on the 1st respondent until the petitioner had established with sufficient certainty as to the real identity of "Ah Seng" referred to in the petition. To do otherwise would be to ask the 1st respondent to shoot in the dark.
>
> Therefore it is my finding that the petitioner had failed to establish and prove the true identity of "Ah Seng" referred to in the petition and thus has not discharged the burden of prove *(sic)*, even on the balance of probability, that "Ah Seng" is someone known to the 1st respondent and had, in the last election, worked and acted as the 1st respondent's agent for the purpose of the election campaign in the distribution of the pamphlets. Further, I accept the submissions by the 1st respondent's counsel that the evidence of RW9 explaining who the persons in the list at folio 15-5-2 of Exhibit P20 were, and the circumstances in which they were employed, should put to rest any suggestion that the "Ah Seng" in the list is in anyway connected to the "Ah Seng" referred to in the petition.

[22] On the credibility of PW2 the learned judge observed at p. 27 of his judgment:

> Is PW2 telling the truth? In my assessment, PW2's evidence is full of contradictions and must be suspected.

Further down he continued:

> PW2 deliberately avoided the questions asked of him by giving answers that are very general and very hard to justify in the circumstances.

[23] The basis on which he came to the above conclusion is well set out in his judgment at pp. 30, 35, 36, 37 & 38. In short the learned judge stated that there were serious contradictions and inconsistencies in PW2's evidence which undermine his credibility. As often been said when the findings of the trial judge are of pure facts, based on the credibility of the witnesses, the appellate court will not as a general rule interfere with such findings. The trial judge is in a better position to assess the credibility of witnesses after having seen and heard them. (See *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2006] 3 CLJ 1, *Hii Soo Chiong v. Board of Management Yee Ting Primary School* (FC) [1973] 2 MLJ 204 and *Chong Sooi Chuen v. Yuen Lai Chun* [1988] 1 LNS 28.) We do not propose to engage in detail analysis of the evidence as this was meticulously done by the learned judge and we find that his findings are fully supported by the evidence before him.

Burden And Standard Of Proof

[24] Moving to the next pertinent issue canvassed before us that is the question of the burden and standard of proof required in a case of this nature. It is settled law that it is for the appellant/petitioner to establish a prima facie case before the respondent is required to answer. This is clearly expressed in the judgment of Raja Azlan Shah J (as His Highness then was) in the case of *Ali Amberan v. Tunku Abdullah* [1969] 1 LNS 6 said as follows:

> Now an allegation of corrupt practice is of a quasi-criminal nature in as much as a finding of corrupt practice entails penal consequences. The onus is on the petitioner to prove it beyond reasonable doubt by evidence which is clear and unambiguous.

And in the case of *Wong Sing Nang v. Tiong Thai King* [1996] 1 LNS 66, the learned Election Judge in Sibu held as follows:

> I have no hesitation in agreeing with counsel for the petitioner that if an act forbidden by statute were done, the Court is allowed to draw from it the ordinary inference *prima facie* that it was done for a corrupt purpose. However, I am of the view that before such inference can be drawn there must be clear and unequivocal evidence before the Court to prove the allegation, bearing in mind that the burden of proving beyond reasonable doubt is on the petitioner.

[25] This is in line with s. 103 of the Evidence Act 1950 which reads:

> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

In short it is for the appellant to prove who this so called "Ah Seng" was and that he was the agent of the respondent. This the appellant failed to prove and on that premise the learned judge had rightly dismissed the petition.

[26] For the above reasons we dismissed this appeal with costs. Deposit to be paid to the respondent to account of taxed costs.